

**Key Opportunities, Inc. and Dorsey C. Tannehill.**  
Case 7-CA-18473

December 16, 1982

**DECISION AND ORDER**

BY CHAIRMAN VAN DE WATER AND  
MEMBERS JENKINS AND ZIMMERMAN

On April 6, 1982, Administrative Law Judge Stephen J. Gross issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and also filed cross-exceptions and a brief in support thereof. Respondent filed an answering brief to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions, cross-exceptions, supporting briefs, and answering briefs and has decided to affirm the rulings, findings, and conclusions<sup>1</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>2</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Key Opportunities, Inc., Hillsdale, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Add the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any references to the discharges of the 'supervisors' and 'aides,' and notify them in writing that this has been done and

<sup>1</sup> Member Jenkins agrees with the Administrative Law Judge that Respondent's clients are not employees within the meaning of Sec. 2(3) of the Act. In so concluding, the Administrative Law Judge focused on the nature of the economic relationship between Respondent and its clients. The Administrative Law Judge also found that most of Respondent's clients have mental or emotional handicaps. Many and possibly a majority of these clients are unable to work outside of a sheltered environment. Member Jenkins would rely on this additional factor as further distinguishing the present case from those involving other handicapped workers. See *The Chicago Lighthouse for the Blind*, 225 NLRB 249 (1976); *Cincinnati Association for the Blind*, 235 NLRB 1948 (1978); *Lighthouse for the Blind of Houston*, 244 NLRB 1144 (1979).

<sup>2</sup> We shall also order Respondent to expunge from its records any reference to the discharges of the discriminatees herein, and to notify them in writing that this has been done and that evidence of the unlawful discharges will not be used as a basis for future personnel action. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

that evidence of these unlawful discharges will not be used as a basis for future personnel actions against them."

2. Substitute the attached notice of that of the Administrative Law Judge.

CHAIRMAN VAN DE WATER, dissenting:

I would not assert jurisdiction in this case. Respondent is a nonprofit, charitable corporation engaged, *inter alia*, in providing a sheltered work environment for handicapped clients. Clients are referred to Respondent by various state and local social and education agencies, who in most instances subsidize Respondent on a per client basis. Respondent's primary purpose for soliciting contracts with manufacturers is to provide work for its clients to prepare them for nonsheltered employment or, at least, as a form of therapy for those who will permanently require a sheltered work environment.

In *Michigan Eye Bank*,<sup>3</sup> I noted that I would return to the policy set forth in *Cornell University*<sup>4</sup> and *Ming Quong Children's Center*.<sup>5</sup> There is no evidence here concerning the effect on commerce of those operations similar to Respondent's. Moreover, the record further indicates that Respondent's commercial activities are "merely ancillary to its rehabilitative objective so that a labor dispute would have only minimal impact on commerce."<sup>6</sup> Thus, the record fails to demonstrate the massive impact on commerce by this type of nonprofit corporation as required under *Cornell* and *Ming Quong*. Accordingly, I would not assert jurisdiction.<sup>7</sup>

<sup>3</sup> 265 NLRB No. 179 (1982).

<sup>4</sup> 183 NLRB 329 (1970).

<sup>5</sup> 210 NLRB 899 (1974).

<sup>6</sup> *Epi-Hab Evansville, Inc.*, 205 NLRB 637 (1973).

<sup>7</sup> In view of this finding, I need not make a determination concerning the employee status of Respondent's clients. I would note, however, that it is difficult indeed to analyze Respondent's operation as a whole, including its relationship to its clients, within the framework of Board law, which is necessarily geared toward commercial enterprises.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge any employee for walking out of a meeting we called as a protest against our method of dealing with employee grievances.

WE WILL NOT discharge any employee for engaging in a walkout to protest our unlawful discharge of a fellow employee.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees, including all persons holding the positions of "supervisors" or "aides," in the exercise of their rights under Section 7 of the National Labor Relations Act.

WE WILL offer immediate and full reinstatement to all "supervisors" and "aides" who we discharged in September 1980 in violation of the National Labor Relations Act. If those positions no longer exists, we will offer substantially equivalent jobs to such employees. In either case our offer will be without prejudice to those employees' seniority and other rights and privileges.

WE WILL make all such unlawfully discharged employees whole, with interest, for any losses that they may have suffered as a result of our discharging them.

WE WILL expunge from our files any reference to the discharges of the "supervisors" and "aides," and WE WILL notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as basis for future personnel actions against them.

#### KEY OPPORTUNITIES, INC.

#### DECISION

##### I. INTRODUCTION

STEPHEN J. GROSS, Administrative Law Judge: Respondent Key Opportunities, Inc., operates a sheltered workshop in Hillsdale, Michigan. Between 70 and 80 handicapped "clients" work in Key's workshop.

Key's staff includes six "supervisors" and three "aides" who, among other things, oversee the clients' work. In September 1980 Key fired all of its supervisors<sup>1</sup> and two of its aides.<sup>2</sup> The facts of those discharges are not in dispute. Key's supervisors and aides sought to meet with Key's board of directors about wages and working conditions. Key opted not to permit any such meeting with its board. Instead Key's executive director, Jane Munson, called the supervisors and aides into meetings that, she said, were in lieu of the requested meeting with Key's board. Supervisor Dorsey Tannehill walked out of one of those meetings, saying that a meeting with Munson

"wouldn't work."<sup>3</sup> Key fired Tannehill the next day "because of his insubordination in leaving the meeting."<sup>4</sup> When the remaining supervisors and aides walked out to protest Tannehill's discharge, they too were fired.

These incidents led Tannehill to file an unfair labor practice charge. And on December 18, 1980, the Board's Regional Director for Region 7 issued a complaint based on Tannehill's charge. Key does not deny the Board's jurisdiction in the matter but does deny any wrongdoing.<sup>5</sup> I heard the case in Hillsdale on October 19, 1981. The General Counsel and Key have filed briefs and the case stands ready for decision.

As the parties agree, the activities for which Key's supervisors and aides were fired were concerted activities of the kind protected by Sections 7 and 8(a)(1) of the National Labor Relations Act (the Act).<sup>6</sup> But those provisions of the Act protect only persons who are "employees" within the meaning of Section 2(3) of the Act, and not "supervisors" under Section 2(11). The parties accordingly also agree that if Key's supervisors and aides are Section 2(11) "supervisors," Key committed no unfair labor practice. And therein lies the dispute. Key claims that its supervisors and aides are "supervisors" for purposes of the Act. The General Counsel argues that they are not and accordingly must be deemed "employees."

Actually the dispute is even more fundamental than that. In order for Key's supervisors and aides to be deemed "supervisors" for the purposes of the Act, they must supervise people who are "employees" for the purposes of the Act: See, e.g., *Douglas Aircraft Company, a Component of McDonnell Douglas Corporation*, 238 NLRB 668, 670 (1978), enforcement denied on other grounds, 609 F.2d 352 (9th Cir. 1979); *The Oakland Press Company, a Subsidiary of Capital Cities Communications, Inc.*, 229 NLRB 476, 477 (1977), enforcement denied on other grounds 606 F.2d 689 (6th Cir. 1979), on remand, 249 NLRB 1081 (1980). And at the heart of this case is the question of whether Key's clients are "employees."

This decision concludes, in part III, that Key's clients are not "employees" within the meaning of the Act. But before getting there it may be useful to take a more detailed look at Key's operations.

<sup>3</sup> Tr. 7.

<sup>4</sup> Tr. 8.

<sup>5</sup> Key is a nonprofit corporation to which the Internal Revenue Service has accorded "charitable" status under Sec. 501(c)(3) of the Internal Revenue Code. For many years the Board refrained from asserting jurisdiction over sheltered workshops such as Key's because of their "close affiliation with State agencies and philanthropic organizations," because their commercial activities were "only a means" toward their goal of "rehabilitation of unemployable persons," and because of "the limited effect on commerce of labor disputes involving such rehabilitation centers": *Sheltered Workshops of San Diego, Inc.*, 126 NLRB 961, 964 (1960), accord, *Epi-Hab Evansville, Inc.*, 205 NLRB 637 (1973). But in *The Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*, 224 NLRB 1344, 1345 (1976), the Board held that it thereafter would not consider the "worthy purpose" of an organization as a factor in determining whether to assert jurisdiction and that "the sole basis for declining or asserting jurisdiction over charitable organizations will now be identical with those which are not charitable." Since that time the Board has asserted jurisdiction in a variety of cases involving nonprofit, charitable sheltered workshops: See, e.g., *The Chicago Lighthouse for the Blind*, 225 NLRB 249 (1976).

<sup>6</sup> See the stipulation to this effect at tr. 5.

<sup>1</sup> Cheryl Agnew, Carla Benzing, LaRue Kunkel Adams, Bob Somerset, Dorsey Tannehill, and Joe Walsh.

<sup>2</sup> Key's three aides were Vickie Fouty, Mark Gardado, and Ken Shaw. The record is unclear as to which of the three were fired.

## II. KEY'S OPERATIONS

Key serves persons with mental, emotional, social, or physical handicaps, through four programs. All four involve providing its clients with jobs.

Key's largest program, "work activities," serves about 30 clients. Work activities clients are sufficiently handicapped that they will probably permanently need a sheltered workshop environment. (On the other hand, Key does not serve people too badly handicapped to perform work at all.) Key's intention with respect to the work activities clients is to provide them with jobs—in a sheltered environment—as a form of therapy. Work activities clients come to Key via local and state social welfare or educational agencies. And the referring agencies subsidize Key on a perclient basis. Key reports regularly to those agencies on the progress of the clients and consults with those agencies before taking any major action in respect to the clients.

Key's "sheltered" program is its next largest: 20 to 25 clients. Key puts a client in its sheltered program if there is real hope that the client may someday be able to successfully leave a sheltered environment. Key sees its role toward its "sheltered" clients as one of providing work rehabilitation leading to the clients finding jobs in private industry. Nonetheless, many of the sheltered clients will never be able to work in a nonsheltered situation. Key is not directly subsidized in respect to its sheltered clients.

Finally, Key's "evaluation" and "adjustment" programs serve a total of about 20 clients. Government agencies refer handicapped persons to these programs for "vocational testing" and for vocational training aimed specifically at the clients' "deficits."<sup>7</sup> As with work activities clients, the referring agencies subsidize Key for each client in the evaluation or adjustment programs.

In order to provide its clients with jobs Key seeks out contracts with manufacturers by which Key provides the contracting company with services such as sorting, painting and lettering, building pallets, packaging liquid chemicals, grinding, and building display boards and shipping supports. Key competes with for-profit industrial concerns for such contracts. Key's clients provide the labor called for by the contracts. The work is done in Key's own facilities—two plants in Hillsdale. In addition Key offers such out-of-plant services as lawn care and wood cutting.

The wages that Key's clients receive are based on a combination of two factors: (1) the wages paid in private industry for the kind of work the client will be doing; and (2) the degree to which the client will accomplish less, because of his or her handicaps, than the normal worker. Wages accordingly average around \$1 an hour.<sup>8</sup> They range from "a few cents" an hour<sup>9</sup> to occasionally as high as \$8 an hour (where a client achieves high productivity). Most clients are paid on a piece rate basis.

All of Key's clients punch a timeclock and work regular hours: 9 a.m. to 3 p.m. 5 days per week. They receive

vacation and holiday benefits. Key makes social security and workers' compensation payments in respect to its clients.

In keeping with Key's purpose and clientele, a violation of work rules by a client generally is handled by discussion between a staff member and the client, not by punishment. But Key does discipline clients for willful and repeated misbehavior, with that discipline ranging from oral warning to "down time" (suspension without pay for a few hours) to, in the most extreme cases, discharge.

Key's routine includes counseling and education sessions with its clients, on topics ranging from personal grooming and hygiene to "good worker traits" to how to use a timeclock. And its recordkeeping includes frequent reports (both periodic and incident related) relating to each client's progress and problems. (In large part those reports are mandated by the agencies that subsidize Key's activities.)

As indicated by the fact that Key is subsidized, the revenues that Key receives from its contracts by no means cover its costs. Key's revenues and expenditures in 1980, 1979, and the last quarter of 1978 are, in summary form, as follows:<sup>10</sup>

<i>Expenditures</i>			
<i>Item</i>	<i>1980</i>	<i>1979</i>	<i>Three Months 1978</i>
"Production" expenses, including staff and client salaries, shop equipment, production supplies, product promotion, truck maintenance	\$163,250	\$82,296	\$18,996
"Rehabilitation" expenses, including administrative costs (such as management salaries, custodial and office supplies, and audit costs), daily transportation of clients to and from work, utilities, and building additions and repairs	203,223	188,799	87,684
<i>Revenues</i>			
Sales of goods and services	\$162,873	\$97,611	\$13,839
"Rehabilitation" (with minor exception, funds received from governmental agencies)	206,321	168,968	84,587

As suggested by the above table, Key does not apportion expenditures or, in some cases, revenues, by program. And as a matter of physical layout, there is an intermixing of programs: in particular, among the evaluation, adjustment, and sheltered programs. Finally, no party has suggested that the supervisory or employee status of Key's supervisors or aides should vary depending upon the program with which each supervisor or

<sup>7</sup> Tr. 67.

<sup>8</sup> "Sheltered" employees average about \$1.20 an hour. Work activities employees average somewhat less. See tr. 76. Key's sheltered workshop certificate from the Department of Labor permits it to pay less than established minimum wages.

<sup>9</sup> Tr. 76.

<sup>10</sup> Data for prior periods are not available. See G.C. Exhs. 5 and 6 for further detail on Key's finances.

aide is associated. Accordingly this Decision will consider the status of Key's supervisors, aides and clients on an aggregate, organizationwide, basis, not program by program.

### III. THE STATUS OF KEY'S CLIENTS

A variety of factors suggest, at first blush, that Key's clients are "employees," in whatever way that term might be defined. The clients work under the direct supervision of persons employed by Key and generally in one of Key's facilities. They work at tasks similar to tasks performed by people who clearly are "employees." Key's clients work full time, or nearly so, under a schedule set by Key. The clients receive wages from Key, and those wages vary depending upon each client's output. Clients get vacation and holiday benefits. Clients are subject to discipline, including discharge.

The fact that Key is a nonprofit organization is of no moment: e.g., *Chicago Lighthouse for the Blind*, *supra*. Similarly, the fact that Key makes every effort to train its clients so that they may leave Key for better paying jobs elsewhere is not telling since relatively few of Key's clients are able to obtain nonsheltered employment and some of the clients in fact stay with Key "indefinitely."<sup>11</sup>

But for all that, Key's relationship with its clients is a special one. For Key does not employ clients with the intention or expectation that it will benefit from their output. Rather Key provides the clients with tasks that result in marketable output solely for the clients' benefit. The only reason Key obtains contracts for the provision of goods and services is in order to provide its clients with work.

The record makes that clear in a number of ways.

For one thing, both testimonial and documentary evidence show that Key's sole purpose is to provide work rehabilitation and work-based therapy to handicapped persons. Key's intended product is the improvement in the well being of its clients. The services and goods produced by the clients are merely part of the process for benefiting those same clients. As Key's executive director put it: "Our most important product is not the sub-contracts we perform but rather that our clients are progressing." (G.C. Exh. 2 at 8; see tr. 83.)

Secondly, Key conducts its business in keeping with that purpose. Thus Key's only criterion for taking on a client is whether the client will benefit from Key's programs.<sup>12</sup> That is the very reverse of the normal hiring standard, which is whether the organization will benefit from the worker's services.

Thirdly, Key loses money on its contracts. As the financial tables in part II show, Key would be financially better off if its clients simply stayed home and Key made no attempt to produce anything.<sup>13</sup>

<sup>11</sup> Tr. 61; see *Lighthouse for the Blind of Houston*, 244 NLRB 1144, 1147 (1979), enforcement denied 653 F.2d 206 (5th Cir. 1981); *Abilities and Goodwill, Inc.*, 226 NLRB 1224, 1229 (1976).

<sup>12</sup> "Key Opportunities doesn't bring in a client because of their anticipated productivity, but increased productivity is an example of a client making progress in the program." Tr. 28 (referring to G.C. Exh. 2 at 4).

<sup>13</sup> It is true that Key obtains a benefit by reason of its clients: without clients Key would receive no governmental subsidies. But those subsidies

In defining the term "employee," Section 2(3) explicitly excludes certain categories of workers. But otherwise the definition is circular: "The term 'employee' shall include any employee . . ." Because of that circularity it is up to the Board to determine which categories of workers should be included in the term and which should not: *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). And that determination can only be made by reference to the purposes of the Act: *Id.*; see *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976). In some cases that has led the Board to conclude that persons not ordinarily considered to be "employees" should be deemed so: e.g., *N.L.R.B. v. Hearst Publications, supra*. But in others the Board has held the reverse—that, even apart from the exclusions specified in Section 2(3), persons who are "employees" by most definitions nonetheless ought not to be deemed "employees" within the meaning of the Act: *Cedars-Sinai, supra*;<sup>14</sup> *Firmat Manufacturing Corp.*, 255 NLRB 1213 (1981).

That brings us back to Key's clients. They are, no doubt, "employees in the generic sense of the term": *Goodwill Industries of Southern California*, 231 NLRB 536, 537 (1977). But Key's clients are not the kind of workers the Act is intended to cover. Central to the effort that led to the enactment of the Act was a concern about the exploitation of employee by employer—about the failure of the then existing system to achieve "a wise distribution of wealth between management and labor": statement of Senator Wagner introducing S. 2926, 73d Cong., 2d Sess. (1934).<sup>15</sup> But "exploitation" has meaning in an employment context only where one employs another in order to derive some net benefit from the other's output. That is not why Key "employs" its clients, and Key does not in fact derive such a benefit from its clients' services.

Key may or not always deal appropriately with its clients. But any governmental protection that Key's clients may need is the kind of protection accorded hospital patients or handicapped students, protection to be provided by social welfare or educational agencies. The provisions of the National Labor Relations Act have no relevance to Key's relationship with its clients.<sup>16</sup>

are a function of Key's rehabilitation, evaluation, and work therapy efforts. They are not a function of the clients' output.

<sup>14</sup> The Board there held that hospital interns and residents are not Sec. 2(3) "employees." For a listing of agencies that hold these same categories of persons to be "employees"—for purposes of other statutory schemes—see Note, "Labor Problems of Interns and Residents: The aftermath of *Cedars-Sinai*," 11 U. San Francisco L. Rev. 694, 712-716 (1977).

<sup>15</sup> 1 Legis. Hist. of National Labor Relations Act, 1935 (hereafter L/H) at 15. See also, e.g., 1 L/H at 18-20, 1150-53, 1315-18, 2 L/H at 2326-27, 2486.

<sup>16</sup> Compare *Cincinnati Association for the Blind*, 235 NLRB 1448 (1978), and *Lighthouse for the Blind of Houston, supra* at fn. 11. The *Cincinnati* and *Houston* organizations operated sheltered workshops, and the Board concluded that the clients who worked in those workshops were Sec. 2(3) "employees." But in both cases the organizations provided a variety of services in addition to the operation of a sheltered workshop. And in both cases the workshops produced a net profit. The organizations then used that profit to subsidize their other programs. (As discussed above, apart from the fact that Key incurs losses in the operation of its workshop, Key has no other programs to subsidize.) In contrast to *Cincinnati* and *Houston*, *Goodwill Industries of Southern California*, 231

*Continued*

I accordingly conclude that Key's clients are not "employees" for purposes of the Act.

#### IV. THE HANDICAPS OF KEY'S CLIENTS

Some of Key's clients are "handicapped" only to the extent that they have been out of the work force for long periods of time and need some help acclimatizing to an industrial environment. But most of Key's clients suffer from mental or emotional handicaps. Thus Key's clients, although most are adults and none are younger than 17, are not expected to provide their own transportation to and from work; some of the clients need repeated daily instruction on tasks as simple as lawn mowing; clients may be so severely handicapped by such problems as "distractability" that their output is only 5 percent as much as that of normal, unhandicapped workers; one of Key's clients cries when he thinks that his supervisor is paying too much attention to a co-worker. It apparently is not uncommon for Key's clients simply to wander away from their work stations, or deliberately to refuse to cooperate with their supervisors, or to throw things at coworkers or supervisors.

The record is far from complete as regards the nature and scope of the handicaps of Key's clients. But even in its present state the record raises the difficult question of whether the Act, which is predicated on the ability of employees to choose to act or refrain from acting in concert with others, ought to apply to persons so handicapped by mental or emotional abnormalities that they can work only in a sheltered environment.<sup>17</sup> In view of the conclusion, in part III, above, that Key's clients are not "employees" by reason of the nature of their economic relationship with Key, that question need not be resolved here.

#### V. THE STATUS OF KEY'S SUPERVISORS AND AIDES

Key's supervisors possess and exercise authority that is supervisory within the meaning of Section 2(11) of the Act—if it were exercised in respect to "employees." The supervisors' recommendations are important—often determinative—on matters such as: what job assignments a client is to receive; whether a client should be disciplined and, if so, the nature of the discipline; and what a client's wage rate should be. Moreover supervisors themselves sometimes discipline a client with "down time" (see part II, above). Under these circumstances, Key's supervisors would be "supervisors" within the meaning of the Act if Key's clients were "employees." But the clients are not

"employees" (as discussed in part III, *supra*), and I accordingly conclude that the persons Key calls "supervisors" are "employees" within the meaning of the Act.<sup>18</sup>

Turning to the aides, they assist and report to Key's supervisors (see fn. 18, *supra*). On matters relating to quality control and to the clients' training and counseling, the aides' duties are much the same as the supervisors'. Moreover aides attend daily meetings with management; they can orally reprimand a client for violations of safety rules and the like; and they may make recommendations to the supervisors on such matters as downtime punishment. I nonetheless conclude that the aides would not be "supervisors" within the meaning of Section 2(11), even if the clients were employees, since their authority over the clients is too indirect and insubstantial. Moreover Key clearly distinguishes the aides' status from that of everyone else (including the supervisors) it claims to be management. Key's aides are paid on an hourly basis (like the clients). The rest of management receives salaries. The aides punch a timeclock (like the clients). The rest of management does not. Finally, two of the three aides employed by Key at the time of the incidents in question (September 1980) first came to Key as clients (in the "sheltered" program). No one else in management was ever a client of Key.

#### CONCLUSIONS OF LAW

1. Key Opportunities, Inc., is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.
2. Persons holding the positions that Key denominates as "supervisor" and "aide" are "employees" within the meaning of Section 2(3) of the Act.
3. Key discharged supervisors and aides because they engaged in concerted activity within the scope of Section 7 of the Act.
4. Key accordingly interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7, thereby committing an unfair labor practice in violation of Section 8(a)(1).

NLRB 537 (1977), involved a nonprofit organization whose only purpose was to provide rehabilitative work experience to handicapped persons. It did this by collecting various donated materials and having its clients refurbish them. (The clients were paid for that work.) While the Board rested on grounds different from those discussed above, the Board dismissed an election petition filed by a union seeking to represent a unit that included the clients (a result contrary to *Cincinnati* and *Houston*). Yet the workshop sales in Goodwill came much closer to turning a profit than do Keys. (Goodwill obtained 95 % of its total revenues from those sales.)

<sup>17</sup> As indicated earlier, in three cases the Board has held that handicapped persons working in sheltered workshops are "employees" entitled to the protections of the Act: *Chicago Lighthouse for the Blind*, *supra* at fn. 5, and *Cincinnati Association for the Blind and Lighthouse for the Blind of Houston*, *supra*, fn. 16. But in those cases the handicap principally involved was blindness, not mental or emotional impairment.

<sup>18</sup> Some of the supervisors' work reflects Key's rehabilitative and therapeutic objectives. Key's supervisors assist clients in the "development of appropriate vocational and social behavior" (G.C. Exh. 11) by, for example, conducting discussion groups. The supervisors hand out medication to the clients. And they provide the extensive and detailed instruction that many clients need. Duties such as these are not supervisory: *The Kent County Association for Retarded Citizens d/b/a J. Arthur Trudeau Center*, 227 NLRB 1439 (1977), *enfd.* 590 F.2d 19 (1st Cir. 1978); *Abilities and Goodwill, Inc.*, 226 NLRB 1224 (1976). Cf. *Southeast Association for Retarded Citizens, Inc. d/b/a Southeast Work Training Center*, 251 NLRB 487 (1980), *enfd.* 109 LRRM 2570 (9th Cir. 1982). Similarly, while Key's supervisors are senior to the aides, no one contends that the supervisors have supervisory authority over the aides and the record would fail to substantiate such a claim even if one had been made. The performance of nonsupervisory duties, however, would not affect the supervisory status of the supervisors under Sec. 2(11)—assuming that the clients were employees—since individuals who perform nonsupervisory duties are nonetheless deemed "supervisors" if, in addition, they hold substantial supervisory authority: see, e.g., *Wisconsin River Valley District Council of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Skippy Enterprises, Inc.)*, 211 NLRB 222, 224-225 (1974), *enfd.* 532 F.2d 47 (7th Cir. 1976).

5. The unfair labor practices described in paragraphs 3 and 4, above, affected commerce within the meaning of Sections 2(7) and 10(a) of the Act.

#### THE REMEDY

The Recommended Order will require Key to cease and desist from the following acts:

1. Engaging in the unfair labor practices described in part VI, paragraphs 3 and 4.
2. Interfering with, restraining, or coercing, in any like manner, its employees in the exercise of the rights guaranteed in Section 7 of the Act.

The Recommended Order shall also require that Key:

1. Reinstate each of the "supervisors" and "aides" that it discharged by reason of the concerted activities described in part I of this Decision to the position he or she previously held, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or other rights and privileges.<sup>19</sup>

2. Make such employees whole for any loss of earnings they may have suffered as a result of their unlawful discharges by Key. Loss of earnings shall be computed as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon<sup>20</sup> to be computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).

Finally, Key will be required to notify its employees of the action being ordered by the Board.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I hereby issue the following recommended Order:<sup>21</sup>

#### ORDER

The Respondent, Key Opportunities, Inc., Hillsdale, Michigan, its agents, successors, and assigns, shall:

<sup>19</sup> The complaint alleges that Key wrongfully discharged nine named persons (six supervisors and three aides). But the transcript suggests that only eight employees were fired: six supervisors and two aides (see tr. 8). In view of this ambiguity the recommended Order will leave identification of the wrongfully discharged employees for the compliance stage: see, e.g., *Atlas Metal Parts Co.*, 252 NLRB 205 (1980), enforcement denied on other grounds 660 F.2d 304 (7th Cir. 1981).

<sup>20</sup> See *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>21</sup> This recommended Order is being issued pursuant to Sec. 10(c) of the Act. Unless exceptions meeting the requirements of Sec. 102.46 of the Board's Rules are filed, the findings, conclusions and recommendations contained in the foregoing Decision and the following recommended Order shall become the decision and order of the Board. In that event all objections and exceptions to the recommended order and foregoing decision shall be deemed waived for all purposes: See Sec. 102.48 of the Board's Rules.

1. Cease and desist from:

- (a) Discharging any employee who walks out of a meeting called by Respondent as a protest against Respondent's method of dealing with employee grievances.

- (b) Discharging any employee who engages in a walk-out to protest Respondent's unlawful discharge of a fellow employee.

- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

- (a) Offer all employees who held the position of "supervisor" or "aide" and who, in the manner set forth in part I of this Decision, were unlawfully discharged, immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of their unlawful discharges, in the manner set forth in the part of this Decision entitled "The Remedy".

- (b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records and reports, and all other documents necessary to analyze and compute the amount of backpay due under this Order.

- (c) Post at its Hillsdale, Michigan, facilities copies of the attached notice, marked "Appendix."<sup>22</sup> Copies of said notice, on forms provided by the Regional Director for Region 7, after being signed by a representative of Respondent shall be posted by Respondent immediately upon receipt and be maintained by it for 60 consecutive days, in conspicuous places, including all places where notices to employees are customarily posted. Respondent shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

- (d) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply with this Order.

<sup>22</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."